FILED
FEB 21 1955
HAROLD B. WILLEY, Clerk

No. 567

Supreme Court of the United States

OCTOBER TERM, 1954

STATE OF MONTANA, ex rel. FORD JOHNSON,

Petitioner,

vs.

THE STATE BOARD OF LAND COMMISSIONERS OF THE STATE OF MONTANA, as Governing Board of the Department of State Lands and Investments; J. HUGO ARONSON, Governor of the State of Montana, President of said Board; MARY M. CONDON, Superintendent of Public Instruction of the State of Montana; SAM W. MITCHELL, Secretary of State of the State of Montana; ARNOLD H. OLSEN, Attorney General of the State of Montana, as members of said Board, and LOU W. BRETZKE, Commissioner of State Lands and Investments,

Respondents.

Separate Brief on Behalf of Respondent J. Hugo Aronson, Governor of the State of Montana

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INDEX

i

AUTHORITIES

CASES— Page

State ex rel. Rausch v. Amerada Petroleum Corp., 78 N. D. 247, 49 N. W. (2d) 14 (1951) 4

STATUTES—

Montana Laws 1953, Chapter 122 2

Montana Laws 1949, Chapter 18, Accepting Amendment to Sec. 11, Enabling Act 3

Revised Codes, Montana 1947, Secs. 84-3810, 75-1704, 75-1723.3, 75-3610, 75-3706, 75-4508, 75-4516 6

MISCELLANEOUS—

Biennial Report Supt. of Public Instruction 6

Figures Compiled by State Commissioner of Lands and Investments, Showing Acres Under Lease, New Leases, Cancellations, etc. 5

Montana Memorial to Congress, 93 Cong. Record 2426 3

Montana Senate Resolution, 1955 8

Average Base Price Per Acre July 1951 and Dec. 1952 7

Average Base Price January 18, 1955 7

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Respondent J. Hugo Aronson, Governor of Montana, respectfully submits this brief with respect to the Petition for Certiorari which has been filed in this case. This respondent fully concurs in the statements and arguments contained in the Petition, and further urges that irreparable loss will be incurred by petitioner and other taxpayers of the State of Montana—and by the public school system

of the State—if the question presented by this Petition is not specifically settled by this Court at the earliest possible time.

This Respondent, as Chairman of the State Board of Land Commissioners, voted to disregard the opinion of the Attorney General of Montana that Chapter 122 of the Laws of Montana, 1953, was invalid (Op. No. 13, Vol. 25) and accordingly voted to call for bids on oil and gas leases on school lands for a period of ten years and as long thereafter as oil or gas should be produced, as required by the 1953 law. When this suit was brought to enjoin the members of the State Board of Land Commissioners from calling for bids for leases in a form not authorized by the 1953 law, this Respondent secured separate counsel, and filed a separate Answer supporting the position of the relator and the intervenor who is the present petitioner. R. 49. The purpose of this brief is to call to this Court's attention certain additional matters that are believed to be important to its consideration of the Petition for Certiorari.

I

The State of Montana has three principal sources of revenue for the support of its public schools: (a) income from school lands granted to the State under the Federal Enabling Act; (b) local (county and school district) taxes levied on property; and (c) state appropriations. Particularly since the discovery in April 1951 of oil and gas in

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the Williston Basin (which extends generally over the eastern one-third of Montana and a substantial part of western North Dakota and South Dakota), revenues from oil and gase leases on school lands have assumed increasing importance in the support of the public school system.

In 1947, informed opinion in Montana recognized that maximum return on oil and gas leases on school lands could not be realized so long as such leases were limited by Federal law to a maximum term of 20 years. For this reason, the two houses of the State Legislature forwarded a Joint Memorial to the Congress of the United States (S. Joint Mem. 7, 80th Cong., 1st Sess., 93 Cong. Rec. 2426) reciting the fact and requesting that Section 11 of the Montana Enabling Act, which imposed this 20-year limitation, be liberalized. The Joint Memorial requested that Section 11 be amended to permit leases to be executed for "such periods of time and on such terms and conditions as may be, from time to time, provided by the Legislative Assembly of the State of Montana." As the Congressional history of the 1948 amendment to Section 11 unquestionably demonstrates (see Petition herein, pp. 9-13), Congress sought to comply with this request and to authorize the standard commercial form of lease for a stated term of years and as long thereafter as oil or gas should be pro? years and as long thereafter as oil or gas should be produced. The State of Montana promptly accepted this amendment by legislative enactment (Chapter 18, Montana Laws 1949). Although the language of Section 11, as amended, is permissive, the legislature indicated its judg-

ment on the value of leases with an "as long thereafter" clause by *requiring*, in Chapter 122, Laws of 1953, that all school land leases thereafter be made in that form.

II

The subsequent opinion of the Attorney General of Montana (accepted by a majority of the State Board of Land Commissioners) that the 1953 State statute was invalid because not permitted by Section 11 of the Enabling Act, as amended, promptly threw the State's whole school land oil and gas leasing program into confusion. The decision of the Montana Supreme Court, conflicting as it does with the interpretation of the same Enabling Act adopted by the Supreme Court of North Dakota two years before the 1953 Montana Law was enacted,[1] compounds that confusion. The State of Montana not only finds it impossible now to obtain the benefits of leases of the newly authorized and required type, but also, as a practical matter, finds it impossible to obtain full benefits from new leases on *any* terms. This is necessarily so because no prospective bidder can know whether the decision below is a correct interpretation of the basic Federal law, or whether the contrary interpretation of the same Enabling Act by the Supreme Court of North Dakota is correct.

III

The seriousness of this situation on income from oil and gas leases on school lands, and the substantial adverse effect on State taxpayers such as Petitioner, cannot be over-

[1] State ex rel. Rausch v. Amerada Petroleum Corp., 78 N. D. 247, 49 N. W. (2d) 14 (1951).

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emphasized. The following figures, taken from official State sources, tell the story:

Year Ending Dec. 31	Acreage of School Lands Under Oil or Gas Lease	Proceeds from Rentals, Bonuses and Penalties
1949	261,989.98	$ 257,195.58
1950	290,634.18	270,713.21
1951	349,608.64	857,645.56
1952	847,832.20	6,455,001.60
1953	636,702.67	479,531.25
1954	279,000.90	414,944.60

These figures have been compiled by the office of the State Commissioner of Lands and Investments. The same source has supplied the following detailed explanation of the drastic reduction which has taken place in the total proceeds from school lands in the past two years (omitting fractions of acres and dollars)

I	II	III	IV	V	VI	VII[2]
Year	Acreage Under Lease Jan. 1	New Lease Acreage	Cancellations	Acres Under Lease Dec. 31	Bonuses & 1st Year Rentals	Total Rentals Bonuses & Penalties (Inc. Col. VI)
1949	228,571	75,851	40,432	261,989	$ 166,079	$ 257,195
1950	261,989	81,082	52,437	290,634	132,987	270,713
1951[3]	290,634	137,234	78,260	349,608	677,538	857,645
1952	349,608	549,987	51,763	847,832	6,114,150	6,455,001
1953	847,832	none	211,129	636,702	none	479,531
1954	636,702	none	357,701	279,000[4]	none	414,944

As a result of the Attorney General's opinion that Chapter 122, Laws of 1953, was invalid, and this litigation that thereafter ensued, no oil and gas leases on school lands were executed during the calendar years 1953 and 1954. The expectation of the legislature was that the more commercially attractive leases authorized by the 1953 law would increase substantially the revenues from rentals and

[2] Royalties on oil and gas leases are regarded as capital and deposited in permanent school fund and not distributed as income as are rentals, bonuses and penalties.

[3] Discovery of oil in Williston Basin, April 1951.

[4] January 26, 1955.

bonuses; instead, they declined from $6,455,001 in 1952 to $414,944 in 1954. During this same period there was extensive leasing in Montana of Federal, Indian, and privately owned lands.

As an inevitable consequence, the payments to Montana school district from the income and interest on state school lands (including the income from oil and gas leases) also dropped very drastically—from $8,291,403 in 1953 to $4,379,124 in 1954—a reduction of $3,912,279.[5] The payments to school districts in Lewis and Clark County, where petitioner is a taxpayer, dropped from $310,613 in 1953 to $161,903 in 1954. This loss in payments to the school districts represents over 11 percent of the total operating expenses of Montana public schools in 1954, i.e., $34,858,000. Instead of permitting taxes for the support of schools to be reduced, the reduction has resulted in an increase in the tax levies of counties and school districts to offset the decline in revenue from the State school lands.[6]

No one can now state how much of the reduction in revenues in 1953 and 1954 has been due to the adverse opinion of the Attorney General and this litigation, and how much to the inability of the State to take advantage of the more favorable leasing terms made available by the

[5] Biennial Report, State Superintendent of Public Instruction, 1952-1954 (Helena, Montana) p. 74.

[6] As pointed out in the Petition for Certiorari (p. 6, n. 2), both the legislature and the county commissioners of each county are required by law to levy property taxes sufficient, when added to the revenues received from state school lands, to complete the school budgets determined according to the procedure spelled out in the statute. Mont. Rev. Code, Secs. 84-3810, 75-1704, 75-1722-3, 75-3610, 75-3706, 75-4508, 75-4516.

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1948 amendment to the Enabling Act. The injunction against the State Board of Land Commissioners issued by the District Court of course precluded leases under the pre-1953 Montana law, and the acceptance by the majority of that Board of the Attorney General's opinion that the 1953 law was unconstitutional made it impossible to seek bids for leases under the 1953 act.

Events since the decision below, however, make it apparent that not all of the State's losses can be attributed to the litigation, and that the State will lose very substantial revenues from its school lands if it cannot take advantage of the greater commercial attraction of leases in conformity with the 1953 act—and in conformity with the leases of Federal and Indian lands, and in conformity with the leases now in use in other land-grant States. When the Attorney General's opinion was issued in March 1953, applications were pending for leases under the 1953 act of 73 tracts of school land totaling 37,561 acres. After the decision of the Montana Supreme Court, the State Board of Land Commissioners, by a majority vote, called for bids on January 18, 1955, in accordance with the pre-1953 Montana law. At the sale held on that date bids were received on only 27 tracts, covering 11,876 acres.[7]

[7] Moreover, the amounts which the State of Montana can realize even from leases in the pre-1953 form have been drastically reduced. The total of amounts of first year rentals and bonuses at the January 18, 1955, sale was $30,160.86. That figure represented a price per acre of only $2.54, compared with an average price per acre of $11.83 for all leases between July 1951 (first leasing after Willison Basin discovery) and December 1952 (last leasing before litigation). The reduction is undoubtedly a reflection of the uncertainty of prospective lessees as to the validity of any lease which the State may now offer—an uncertainty which can be removed only by an authoritative construction of Section 11.

CONCLUSION

The question presented by the Petition for Certiorari *is* a simple one of statutory interpretation. The Petition shows that the intent of Congress appears to have been unmistakably to authorize the very form of leases which the court below has held invalid under the Enabling Act. The importance of the question to the citizens and taxpayers of Montana, and in truth to the people of all four States can hardly be questioned.

Moreover, there is urgent need for a prompt resolution of the question. On February 4, 1955, the Senate of the Montana legislature adopted, by unanimous vote, a resolution calling on the State Board of Land Commissioners "to use its best efforts" to obtain a speedy decision from this Court.[8] The State and its taxpayers will continue to suffer until the construction of Section 11 is authoritatively resolved—which can be done only by this Court.

Under this unusual combination of circumstances, it is respectfully urged that not only should the Petition for Certiorari be granted, but that the j u d g m e n t should be reversed without further argument and the cause remanded to the Supreme Court of Montana with instructions to proceed not inconsistently with the concise and plaintly correct

[8] The text of the Resolution states:

Be Is Resolved by the Senate of the Thirty-Fourth Legislative Assembly of the State of Montana:

Whereas, a petition has been filed in the Supreme Court of the United States in the case of State ex rel Jones vs. State Board of Land Commissioners et al, by which petition a review is requested of the decision issued by the Supreme Court of Montana which held that oil and gas leases of state school lands provided for by Chapter 122, Laws of Montana, 1953, would violate the

interpretation of Section 11 of the Enabling Act, as amended, which is set forth in the judgment of the Montana District Court for Lewis and Clark County (R. 74; Appendix to Petition for Certiorari, pp. 28-31). If the Court believes that it should hear oral argument on the question before issuing its decision, it is further respectfully urged that the Court advance the case on its docket so that it may be heard before the Court adjourns.

Respectfully submitted,

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Enabling Act of the states of Montana, North Dakota, South Dakota, and Washington, as said act was amended by Congress in 1948 at the request of the Thirtieth Legislative Assembly of the State of Montana, and

Whereas, since April of the year 1953, said case has been pending in the courts and no oil and gas leases have been made by the State of Montana, with the result that anticipated revenues from state oil and gas leases have not been available for distribution to the public schools, and

Whereas, subscribing to the principle that the orderly and historic processes of American government provide that every litigant be permitted to appeal to the highest court in the land having jurisdiction of his case, we conceive that in right and justice this appeal is entitled to be promptly presented to the Supreme Court of the United States, and

Whereas, the decision of the Montana Supreme Court in said case conflicts with the construction of the aforesaid Enabling Act by the Supreme Court of North Dakota, resulting in confusion, hampering the oil and gas development of state lands in Montana; and it is thus important to the people of Montana

that the said Enabling Act have a uniform construction and operation in the states of Montana, North Dakota, South Dakota, and Washington, and

Whereas, the great Williston Basin, which is the scene of intensive activity in oil and gas exploration and development, comprises large areas of land in Montana, North Dakota, and South Dakota, and it is important that oil and gas activity and development on state lands proceed without uncertainty as to the validity of such leases, and

Whereas, it is therefore urgently necessary for the welfare of Montana that the appeal of the aforesaid decision of the Montana Supreme Court be submitted to the United States Supreme Court at the earliest possible date, so that the question presented by such appeal may be finally decided during the current session of the Legislative Assembly of Montana, if possible.

Now, Therefore, Be It Resolved, that the State Board of Land Commissioners, Arnold H. Olsen, as Attorney General of the State of Montana and as attorney for said State Board of Land Commissioners, and J. Hugo Aronson, Governor of the State of Montana, each and all of them, be, and they hereby are, urged and requested, in the best interests of the State of Montana, to promptly file their respective appearances before said United States Supreme Court and to prosecute said appeal without delay; and they are further urged and requested to use their best efforts and influence to persuade said court promptly to hear and adjudicate said appeal, to the end that the clouds and suspicions with which oil and gas leases are now burdened may be dispelled and so that money again may flow into the school funds as they properly should do.